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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF DOUGLAS H. KAZEN and NORTH PACIFIC DENTAL, INC., Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB No. 77-175 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeal of a $250 civil penalty for outdoor burning allegedly in violation of respondent's Section 8.02(3) of Regulation I came on for hearing before the Pollution Control Hearings Board, Dave J. Mooney, Chairman, and Chris Smith, Member, convened at Seattle, Washington on February 1, 1978. Hearing examiner William A. Harrison presided. Respondent elected a formal hearing.

Appellant Douglas H. Kazen appeared pro se. Respondent appeared by and through its attorney, Keith D. McGoffin. Court reporter Christina M. Check reported the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I

Respondent, pursuant to RCW 43.21B.260, has filed with this Hearings Board a certified copy of its Regulation 1 containing respondent's regulations and amendments thereto of which official notice is taken.

II

Appellant, Douglas H. Kazen, owns real property at 13651 - 100th Avenue Northeast, Kirkland. At times pertinent to this appeal there were several buildings on the lot including a small warehouse and wholesale greenhouses. No one resided on the lot.

About the end of October, 1977, the appellant personally removed the roof from a shed which was attached to the warehouse. Because the pickup truck which he customarily uses was temporarily unsafe to drive, he did not carry the roofing debris to the county transfer station as he would have, otherwise. Instead, he stacked the debris on the lot, some 400 feet back from the road frontage on 100th Avenue Northeast, with the intention of removing it to the transfer station when the truck was repaired, which was to have been done shortly. The roofing debris primarily consisted of asphalt tarpaper.

III

Some three to five days later, on November 3, 1977, the Kirkland Fire Department responded to a fire call on appellant's lot around

8:00 p.m. The roofing debris left by appellant was on fire, and was burning with considerable flame and smoke. The fire was extinguished by the Fire Department who then notified respondent of the fire, as is the usual procedure. No one was present at the scene of the fire when the Fire Department arrived. The appellant, Mr. Kazen, vigorously testified that he was working late at his office, some three miles away, at the time of the fire, that he did not authorize it and that he had no knowledge of it until the following day.

IV

At the time of the fire, the appellant's lot was enclosed by a chain link fence, four to five feet high, along the front and partially along each side. The balance of the lot was enclosed by a natural barrier of blackberry briers, at least as high as the fence. There was only one gate in the chain link fence, through which the Fire Department entered, only after cutting the lock.

V

Children frequently enter the appellant's lot and play there or cross it on their way somewhere else. Appellant knows of this but has not previously experienced a fire on the lot nor has he previously violated the respondent's regulations.

Appellant received a Notice and Order of Civil Penalty, No. 3587, alleging violation of Section 8.02(3) of respondent's Regulation I and assessing a civil penalty of $250. From this Notice, appellant appeals.

VI

Any Conclusion of Law hereinafter stated which may be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I

Section 8.02(3) of respondent's Regulation I relates to outdoor burning and says:

> It shall be unlawful for any person to cause or allow any outdoor fire:
> . . .
> (3) containing garbage, dead animals, asphalt, petroleum products, paints, rubber products, plastics or any substance other than natural vegetation which normally emits dense smoke or obnoxious odors; or
> . . . .

Also pertinent is Section 8.04(b) which states:

> It shall be prima facie evidence that the person who owns or controls property on which an outdoor fire occurs has caused or allowed said outdoor fire.

Section 8.02(3), above, prohibits the outdoor burning of the type of debris involved here. The section is not violated, however, except by one who "caused or allowed" the fire.

The effect of Section 8.04(b), above, is to create a rebuttable presumption sufficient to create a prima facie case against the appellant as landowner. This shifts the burden of going forward with the evidence to the appellant, although the ultimate burden of proof remains with the respondent in penalty cases. Going forward with the evidence, appellant testified that he did not ignite, authorize or know of the fire at the time it occurred, which we accept as factual. From this and other evidence we conclude that respondent has not proven that appellant personally, or vicariously, "caused or allowed"

the fire in question.

Notwithstanding that, however, there is another ground upon which appellant must defend, for we have held that one may "cause or allow" a fire upon his land:

> . . . when he fails to take reasonable and timely precautions to prevent the continuing and unauthorized entry thereon of persons known by him to ignite fires . . . .

Kneeland v. Olympic Air Pollution Control Authority, PCHB No. 778 (1975). See also B & M Food Stores, Inc. v. Puget Sound Air Pollution Control Agency, PCHB No. 1047 (1977). The following facts from this appeal are pertinent: (1) Although children played on the property, appellant had not experienced any prior fires; (2) the debris was placed 400 feet back from the road frontage and behind buildings, and (3) the perimeter of the property was enclosed with fencing or equally protective blackberry briers. In addition, appellant would have removed the debris from the lot but for his temporary inability to do so, and the debris was stored on the lot only three to five days when the fire occurred.

For these reasons, we conclude that respondent has not proven that appellant "caused or allowed" the fire in question by failing to take reasonable precautions against unknown intruders.

We finally conclude that respondent has not proven its case against appellant.

III

Whether a person has "caused or allowed" an outdoor fire requires patient inquiry into the facts of each case. A set of facts only slightly different from those found here may so change the balance of proof as to lead to the opposite result.

IV

Any Finding of Fact which may be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The $250 civil penalty is vacated.

DONE at Lacey, Washington, this 23d day of February, 1978.

POLLUTION CONTROL HEARINGS BOARD

Dave J. Mooney

DAVE J. MOONEY, Chairman

Chris Smith

CHRIS SMITH, Member